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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 964

WELFARE FINANCE CORPORATION

&

NATIONAL FACTORS, INC., *Petitioners,*

v.

TANENBAUM TEXTILE CO., INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and order of the Supreme Court of Ohio, entered on October 7, 1964 in the cause entitled Tanenbaum Textile Co., Inc.,

Plaintiff-Appellee v. Welfare Finance Corporation and National Factors, Inc., Defendants-Appellants #38902.

OPINIONS BELOW

There is no reported opinion in the Supreme Court of Ohio; its judgment and order of dismissal is reported at 177 Ohio St. 54, 201 N.E.2d 886 (Appendix E). The certificate of said court certifying the existence of federal questions is set forth in Appendix F. The opinion of the Court of Appeals, First Appellate District of Ohio is reported at 201 N.E.2d 787, (Appendix D). The Memorandum Opinion and Separate Findings of Fact and Law of the Court of Common Pleas, Hamilton County, Ohio are not reported, but are set forth in Appendices B and C respectively.

JURISDICTION

The judgment and order of the Supreme Court of Ohio was entered on October 7, 1964. By order of this Court dated 22 December 1964, time to file this petition was extended up to and including March 6, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) since state action was drawn into question on the grounds of its being repugnant to Article VI, Clause 2 of the Constitution of the United States and the Statutes of the United States, to wit, 31 U.S.C. § 203 and 41 U.S.C. § 15 and rights, privileges and immunities were claimed under Statutes of the United States, to wit, 31 U.S.C. § 203 and 41 U.S.C. § 15.

QUESTIONS PRESENTED *

1. Where Congress has enacted the Assignment of Claims Act of 1940 as amended, 31 U.S.C. § 203, 41 U.S.C. § 15, permitting prime contractors of the Department of Defense (and other departments and agencies) to assign to private and government[1] financing institutions monies due or to become due from the United States to induce such financing institutions to lend money to such contractors in order to facilitate, effectuate and implement a national program and policy for the procurement of materials of war to secure the national defense, can the courts of the State of Ohio apply a state rule of common law to assignments received by such a financing institution which places such institution in "the shoes of the prime contractor" and makes it a mere stakeholder or guarantor of the prime contractor's obligations to subcontractors

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* The Court may speculate as to the failure of the United States to "intervene" in the proceedings below in view of the petitioner's assertions regarding federal questions and impact on government procurement, of which petitioners have informed the government.

As more fully appears herein, *infra*, petitioners, and the prime contractor are involved in a "dispute" with the government over the "termination settlement" with regard to which, "appeal" proceedings were instituted pursuant to the terms of the prime contracts and Armed Services Procurement Regulations and an action instituted by the prime contractor and petitioners as assignee against the United States in the United States Court of Claims for substantial damages and a review under "Wunderlich Act," 41 U.S.C. §§ 321-322 of the determinations made by the government in the termination proceedings.

[1] "V" loans by Departments of Defense, Agriculture, Commerce and Interior, and General Services Administration and Atomic Energy Commission, 50 U.S.C. App. 2091, E.O. 10480; direct loans by Treasury Department, 50 U.S.C. § 2092, E.O. 10480, par. 310; Small Business Administration, 15 U.S.C. § 636, 13 C.F.R., Parts 120, 121 and 122; and Small Business Investment Corporations licensed by Small Business Administration, 43 Comp.Gen. 138.

to the extent of monies received under such assignment?

2. Is the enunciation and application of the common law of the State of Ohio, making an assignee-financing institution, which has received monies due from the United States pursuant to a valid assignment made under Assignment of Claims of Act of 1940, as amended, such a stakeholder or guarantor in conflict with, federal statutes regarding such assignments?

3. Does the application of such common law rule subject the procurement policies and programs of the United States to state control and introduce disparities, confusion and conflict so as to make such state action[2] repugnant to Article VI, Clause 2 of the Constitution of the United States?

4. Where a government prime contractor has borrowed money from a financing institution for the performance of a supply contract[3] with the Department of Defense pursuant to the provisions of the Armed Forces Act[4] and to the Armed Services Procurement Regulations[5] and such contractor has duly assigned to said financing institution all monies due or to become due from the United States, is the financing institution

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[2] *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958); *Barrows* v. *Jackson*, 346 U.S. 249, 253 (1953); *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1947); *American Federation of Labor* v. *Swing*, 312 U.S. 321 (1940).

[3] The type of contract involved in the instant case must be distinguished from contracts for the construction, alteration or repair of public buildings or public works. The rights of parties involved in such contracts are delineated in 49 Stat. 793, 40 U.S.C. § 270(a), and cases decided by federal courts. (P. 13 *infra*)

[4] 10 U.S.C. §§ 3012, 6011 and 8012.

[5] 32 C.F.R. § 1.108, *et seq.*

obligated to pay the claims of unpaid subcontractors of the prime contractor out of monies received by the financing institution under such assignment, upon termination, when such institution has not been repaid all the sums advanced to the prime contractor in connection with said prime contract?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

ARTICLE VI—Clause 2. Supreme Law of Land

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code

Titles 31 U.S.C. § 203 and 41 U.S.C. § 15 involved herein are set forth in full in Appendix A.

STATEMENT

On May 13, 1955 and June 30, 1955 The Douglas Corporation (hereinafter called Prime Contractor, Contractor or Prime) entered into four written fixed-price prime supply contracts with the Department of the Army for the manufacture and delivery to the government of a substantial quantity of nylon-coated ponchos.

On June 7, 1955 and July 5, 1955, The Douglas Corporation executed and delivered to petitioner, National Factors, Inc., four written assignments, one for each of the prime contracts, under which, for value

received, the contractor sold, assigned, transferred and set over to said petitioner "all monies due or to become due" under each of said four contracts. On August 9, 1955 said petitioner duly filed with the government (which duly acknowledged receipt thereof) "Notice of Assignments" to which were attached true copies of each assignment.

Thereafter, the contractor negotiated with and ultimately placed orders with respondent which orders were accepted effective on or about October 3, 1955 by respondent with full knowledge of the execution of said four assignments. Respondent agreed to furnish to the prime contractor (at the plant of another subcontractor of the prime) the nylon-coated poncho cloth required by the prime for the fabrication of the ponchos described in the four prime contracts.

During the course of the efforts of the prime contractor and its various subcontractors to perform, petitioners, at the written request of, and for the account of the prime contractor, advanced various sums of money to its principal subcontractor, U S. Display Corporation, and others. On March 25, 1957, the government, upon notice to the prime and petitioners, and prior to completion, suspended all further work on the aforesaid four contracts by the issuance of an order of "Termination for Convenience of the Government".[6] To the date of said termination order,

[6] The phrase "Termination for Convenience of the Government" is not used to indicate a default, breach or cancellation of the contract, nor the completion thereof or a termination of all of the rights and obligations of the parties thereunder. See *Houdaille Industries, Inc.* v. *United States*, 138 Ct.Cl. 301, 151 F.Supp. 298 (1957); *Klein* v. *United States*, 152 Ct.Cl. 8, 285 F.2d 778 (1961); *John Reiner & Co., etc.* v. *United States*, —— Ct.Cl. ——, 325 F.2d 438 (1963); *Brown & Son Electric Company* v. *United States*, —— Ct.Cl. ——, 325 F.2d 446 (1963); *Goldwasser* v. *United States*, —— Ct.Cl. ——, 325 F.2d 722 (1963).

petitioners had advanced for the account of the prime contractor approximately $281,585.70. Between the date of said termination and during the pendency of "termination procedures", which were "concluded" on or about July 17, 1960, additional funds were advanced by petitioners for the account of the prime, so that on said date there was due to petitioners the sum of $658,453.66 plus interest.

On July 18, 1960, petitioners, as assignees, received from the government the sum of $259,307.35 representing monies due and owing to the prime contractor. Accordingly, as of July 18, 1960, the prime contractor was indebted to petitioners for unpaid balance of $399,146.31 plus interest. Subsequent to July 18, 1960, petitioners, at the request of the prime contractor, made additional payments and other advances in connection with said four contracts in the amount of $848,960.23 for total advances of $1,507,413.89 from shortly prior to the inception of the four prime contracts to May 31, 1963. During this entire period petitioners as assignees, had received from the government the sum of approximately $712,878.66 and other credits and funds not germane to this dispute. On May 31, 1963 there was still due and owing to petitioners from the prime, $747,841.21 plus accrued interest.

The prime contractor, dissatisfied and aggrieved by the determination made by the government in termination procedures, on August 20, 1962 noted an appeal to the Armed Services Board of Contract Appeals (In re: *Appeal of The Douglas Corporation*, ASBCA No. 8566)[7] under the "disputes" procedure provided in the prime contracts and Armed Services Procurement

[7] This Appeal was "dismissed without prejudice" on August 10, 1964 at the request of the government pending further investigations and is subject to reinstatement upon completion thereof.

Regulations. In addition, the prime contractor and petitioner, National Factors, Inc., as assignee, on March 22, 1963 instituted an action against the United States in the United States Court of Claims for breach of contract and review of the administrative determination regarding termination, under the "disputes" article of the contract and requested damages in the amount of $2,300,000.00 (*National Factors, Inc., Assignee and The Douglas Corporation* v. *United States*, Ct.Cl. No. 93-63).

On February 10, 1961, prior to commencement of the above proceedings, the respondent filed suit against the petitioners in the Ohio Court of Common Pleas, asserting three causes of action. Only the second cause of action was litigated to conclusion, and the judgment thereon is the subject of the instant petition.

The second cause of action asserted that the prime contractor was indebted to the respondent for the sum of $244,953.28; that payments and credits on account had been made to it in the sum of $162,428.50[8] and that there remained due and owing to the respondent $82,524.72 (of which amount respondents owed its subcontractors $36,713.97). Respondent conceded it had knowledge that the contractor had executed the assignments prior to incurring any obligation to respondent; that subsequent to aforesaid termination, petitioners had received as assignees of the prime contractor the sums of $284,484.29 from the government, but asserted that such payment by the government was "conditioned" on the payment of such monies to subcontrac-

[8] While the respondent did not so state, there is no dispute that sums were paid to it by the petitioners for the account of the prime contractor prior to the time the government made its "last" payment on July 18, 1960.

tors, including the respondents, and that no portion of said sum had been paid to respondent.

Petitioners asserted that the contractor had claims pending against the government and was engaged in a dispute and litigation with the government; that the contractor was indebted to the petitioners for sums in excess of the amounts received from the government, and that by virtue of the assignments made pursuant to the Assignment of Claims Act (Appendix A) and the law in such cases, the petitioners had an absolute right to apply monies received against the unpaid balance of the contractor's debt to petitioners.

Following a trial without a jury, the Court of Common Pleas issued its Memorandum Opinion, dated October 14, 1963 (Appendix B) and on November 29, 1963 entered judgment in favor of respondents in the amount of $82,524.72, together with interest from July 28, 1960 in the sum of $16,536.62. Motions for new trial were duly made and denied. An appeal was duly taken to the Court of Appeals, First Appellate District of Ohio. The matter was heard on the transcript of the docket and journal entries of the Court below, a bill of exceptions, briefs of the parties and oral argument, and on April 27, 1964 said Court handed down its opinion and decision affirming the judgment of the trial court (Appendix D).

Petitioners thereupon duly noted their appeal to the Supreme Court of Ohio and in their assignment of errors again asserted their rights under the Assignment of Claims Act. Respondents moved to dismiss the appeal and, on October 7, 1964, the Supreme Court of Ohio dismissed the appeal without opinion (Appendix E).

As appears from the Certificate of the Supreme Court of Ohio, dated March 1, 1965, the petitioners raised federal questions. The details of petitioner's pleadings, brief after trial and before judgment, brief and supplemental brief in support of its motion for a new trial in the trial court, petitioner's assignment errors, brief and reply brief in the Court of Appeals, and petitioner's Notice of Appeal and Motion to certify the record to the Supreme Court of Ohio, all clearly establish that petitioners raised the question of title, right, privilege and immunity under 31 U.S.C. § 203 and 41 U.S.C. § 15 and the constitutional conflict between the common law of Ohio and the aforesaid federal statutes.

REASONS FOR GRANTING WRIT

1. The Court of Appeals below found:

> . . that the court below based its judgment both upon the applicability of the Ohio common law rule relative to assignments generally to the effect that the rights of the assignee are controlled by those of the assignor and, further, upon the applicable Federal statute, the so-called Assignment of Claims Act and upon the specific provisions contained in the contract itself for the payment of claims upon termination. The judgment below is right on both counts. 201 N.E.2d 787, 788 (Appendix D)

It is, therefore, clear that the decisions below rest upon the application of Ohio common law to the rights of the petitioners under the Assignment of Claims Act and the contract between the United States and the prime contractor (see *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1942).

The decisions of the Courts below, therefore, fall within the ambit of cases before this Court since

M'Culloch v. *Maryland*, 4 Wheat (U.S.) 316, 427 (1819) involving state action—whether legislative or judicial—which imposes upon the performance of activity sanctioned by federal license, conditions not contemplated by Congress . . . or which give a state control over the performance of duties of contractors to perform work for the federal government, or where state law touches upon the area of . . . a federal statute . . . so that it is . . . set at naught or its benefits denied by state law. See: *Sears, Roebuck & Co.* v. *Stiffel & Co.*, 376 U.S. 225 (1964) (state common law rule on unfair competition impinging on federal patent law); *Sperry* v. *Florida*, 373 U.S. 379 (1963) (practice of patent law in a state); *United States* v. *Georgia Public Service Commission*, 371 U.S. 285 (1963) (application of state statute fixing rates of carriage of household goods to charges fixed in a government contract); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960) (state regulation of federally licensed vessels); *Public Utilities Commission* v. *United States*, 355 U.S. 534 (1958) (application of state statute controlling transportation charges and application to federal procurement of such services); and *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956) (regulation of contractors performing work for federal government).

Where the Congress has expressed national concern over the preservation of small business firms; has implemented this policy by authorizing direct lending of public funds and pledging of the federal credit to small business;[9] has further implemented that policy by authorizing preferences and set-asides of government procurement to small business;[10] seeks to en-

[9] 15 U.S.C. §§ 636, 661.

[10] 10 U.S.C. § 2301; 15 U.S.C. §§ 637, 644; 38 Comp. Gen. 864.

courage private lenders to finance government contractors, producing material of war and other goods and supplies in the interest and furtherance of national defense by enacting legislation intended to assure such lenders of the validity of their assignments and the protection of the security created thereunder;[11] this Court should determine whether state action which derogates such assignments' validity and priority and which dilutes their effectiveness as security should be permitted to defeat or limit procurement policies settled under federal authority.

> Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. (*United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944))

2. The decisions of the Courts below, if allowed to stand will introduce "disparities, confusion and conflicts" that will seriously and substantially impinge on federal procurement policies and unduly burden the execution of programs enacted for the security and national defense. It is clearly established that Congress, in enacting the Assignment of Claims Act of

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[11] House Report No. 376, 82nd Cong., 1st Sess., pp. 1-3, Senate Report No. 217, 82nd Cong., 1st Sess., pp. 1-2.

1940, and in amending that act in 1951, intended to assist the national defense program, *New Amsterdam Casualty Company* v. *Manufacturers and Traders Trust Company*, 330 F.2d 575 (1964), and more specifically to *encourage independent financing* of government contracts, *Central Bank* v. *United States*, 345 U.S. 639, 646 (1953); *Mercantile National Bank* v. *United States*, 150 Ct.Cl. 700 (1960); *American Fidelity Co.* v. *National City Bank of Evansville*, 266 F.2d 910, 915 (1959) and cases therein cited.

The decisions below *discourage* the financing of government contracts by making the rights of the assignee-financing institutions extremely doubtful by subjecting such rights to fifty variant state rules (whether statutory or common law)[12] rather than one uniform rule applicable to federal supply contracts. Government financing institutions *cannot*[13] and private institutions *will not* advance monies to contractors where their collateral is subject to "after-arising" equities between the contractor-assignor and any other party that

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[12] Besides the common law rule enunciated in the Courts below, other states apply other common law rules. Some require an assignee to give notice. Others follow the "first in time, first in right" view (see the Restatement of Contracts § 173). New York follows the rule which gives the prior assignee an absolute prior right to any monies collected.

Many states have modified the common law rules by statutory enactments. Some states have "validation" statutes similar to the New York common law rule. Others adopted "bookmarking" statutes; still other states, notably California, adopted "notice filing" statutes patterned after the requirement of the Uniform Receipts Act.

[13] See Small Business Act, 15 U.S.C. § 636(a)(7) which requires that Small Business Administration loans and advances ". . . be of such sound value or so secured as reasonably to assure repayment."

may have subsequently dealt with the prime.[14] Yet, the decision below squarely places the assignee "in the shoes of the assignor", as to such "after-arising" equities, and requires *it* to pay even while *compulsory* proceedings involving the government contracts are pending before administrative and judicial tribunals.

While the decision below will affect sources of credit of all government contractors, the impact will fall most heavily on small business concerns engaged in contracting with the government. This Court needs no citation for the fact that lines of credit which are open to "big business" are not available to smaller enterprises, and that the only significant type of financing offered to such small business concerns is that which contemplates "receivable financing", i.e., pledge or assignment of monies due or to become due. Yet the United States government has affirmatively fostered small business participation in government and defense procurement.[15] The effective implementa-

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[14] Certainly lending institutions will not lend money under an assignment where payments received must be turned over to other creditors later-in-time, or where such moneys must be paid out even before resolution of the rights of the contractor or the assignee against the government can have been litigated and concluded in the only forums provided therefor by the contract and the applicable federal statutes and regulations. (*United States* v. *Bianchi infra;* see discussion under point 3 *infra.*)

[15] Government Small Business and Procurement Practices and Programs, H.Rep. No. 1937, 88th Cong., 2d Sess., Dec. 24, 1964 at p. 1, which discusses the federal policy of encouraging small business participation in federal procurement as specifically embodied in the Defense Production Act of 1940; the Armed Services Procurement Act of 1947; the Universal Military Training Services Act of 1948; the Federal Property and Administrative Services Act of 1948; the Communication Satellite Act of 1962.

tion of these affirmative federal policies should not be placed in jeopardy as they are by the decisions below.

In fiscal 1963 the United States spent 27,793 million dollars for defense procurements. Of that amount, 4,597 millions or some 16% of the total amount was spent on procurements awarded to small businesses.[16] During that same fiscal year, prime procurement contracts totalling 1,346 million dollars were awarded to concerns located in Ohio (see Statistical Abstract of United States, 1964, 85th ed. p. 259). Even if the decision below were limited to Ohio, and affected only some 16% of the Department of Defense contracts awarded to small business in that state, its effects would be felt nationally. But the impact is not limited to Ohio. The decision below makes the rights of the assignee of funds due or to become due under a federal contract subject to the provisions of the laws of each of the fifty states[17] and affects not only small business but all government contractors.

Patently, private and public lenders, confronted with this uncertainty and the need to treat differently with contractors in each of the fifty states, will either refuse to make loans to contractors in certain states, or will impose higher interest rates and other onerous conditions which ultimately result in higher costs to the government. The end result will be a narrowing of the mobilization base, reduction of competition for government procurement, and the con-

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[16] *Id*, Appendix F at p. 122.

[17] This Court recently granted certiorari in *United States* v. *Yazell*, Dk.No. 575 which presents an issue similar to that here presented. When loans are made by the Small Business Administration, are the rights of the parties to be governed by the terms of the federal statute or by the laws of the fifty different states?

centration of such procurement in certain states or in smaller numbers of companies to the serious impairment of not only the national defense capability but the economic well-being of many communities.

3. The decisions of the Ohio Courts below are in direct conflict with the Federal Court decisions in *Peterman Lumber Company* v. *Adams*, 128 F.Supp. 6 (W.D.Ark. 1955) and *Scarborough* v. *Berkshire Fine Spinning Associates*, 128 F.Supp. 948 (S.D.N.Y. 1955), *aff'd per curiam*, 243 F.2d 575 (CA 2, 1957).

The *Peterman* decision held that an assignee has first right to "moneys due or to become due" under the government contract until the debt secured by the assignment has been fully paid. The *Peterman* decision and the decisions below are squarely inapposite.

The *Scarborough* case *supra*, involved a suit by the trustee in bankruptcy, on behalf of the creditors, for the return of moneys paid to an assignee under a valid assignment, and then paid to a third party. The rights of the third party were the rights of the assignee, which, the court held, were paramount to those of the creditors. In both *Peterman* and *Scarborough*, as in the proceedings below, there was no question but that the assignments were valid under both federal and state law. The opinions diverge, however, on the question of which law, state or federal, governs the rights of the parties under such valid assignments. *Peterman* clearly held that federal law governed the rights of the parties. The decision below holds that state law must prevail. *Scarborough* makes no specific choice between federal and state law since the same result would have ensued. The question should be resolved.

The appellate court below reinforced its conclusion that the trial court was correct in its application of the state common law to the present controversy by referring to the "provisions contained in the contract itself for the payment of claims upon termination." (see App. D) The court was apparently relying on a modification agreement executed by the government and the prime *after* the contracts were terminated. This modification, it is claimed by the respondent, binds the contractor to make payment to its subcontractors within ten days of the settlement without regard to "moneys" due under the assignment.[18] Consequently the courts below decided that the government can control the disposition of assigned funds "due or to become due" under a contract, by modifying the contract *after* the filing of a valid assignment pursuant to the Assignment of Claims Act. That conclusion is contrary to this court's decision and the principles enunciated in *Central Bank* v. *United States, supra,* and the decisions in *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Co.*, 149 F.2d 73 (CA5, 1945); *Bank of Arizona* v. *National Surety Corp.*, 237 F.2d 90 (CA9, 1956); and *American Fidelity Co.* v. *National City Bank of Evansville*, 266 F.2d 910 (CADC, 1959), all of which held that the government,

[18] As noted above, the contract termination dispute has not yet been finally settled; an appeal from the contracting officer's determination is now "pending" before the ASBCA and the Court of Claims. See *United States* v. *Bianchi*, 373 U.S. 709 (1963). Though the settlement was not accepted by the contractor as final payment, and though the matter is now before the ASBCA, the courts below saw fit to decide which of the contractor's creditors were entitled to immediate payment from the funds received. This "premature" state court determination, whether or not correct, underlines the problems and disparities that concerned this Court in *United States* v. *County of Allegheny supra.*

the contractor and the assignee were bound by the terms of the assignment as well as the express terms of the Assignment of Claims Act, which secures the assignee to the extent of monies advanced.[19]

CONCLUSION

For all the foregoing reasons, the issues herein presented do involve serious, substantial and important questions of Federal law which should be decided by this Court.

Respectfully submitted,

I. H. WACHTEL
Attorney for Petitioners
1100 - 17th Street, N. W.
Washington, D. C.

HARRY M. WASSERMAN,
JEAN J. PROVOST, JR.,
Of Counsel

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[19] The government's ability to *control* the disposition of termination settlement moneys regardless of the existence of a valid assignment is particularly startling when viewed against the 1951 amendments to the Assignment of Claims Act which bar the government from offsetting from moneys assigned, liabilities of the contractor to the government. (see App. A and footnote 11 *supra*).

APPENDIX A

31 U. S. C.

§ 203. Assignments of claims; set-off against assignee. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share, thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgment of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided*,

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without

the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Com-

mission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or non-withholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section, shall be deemed to affect or impair rights or obligations heretofore accrued. R. S. § 3477; May 27, 1908, c. 206, 35 Stat. 411; Oct. 9, 1940, c. 779, § 1, 54 Stat. 1029; May 15, 1951, c. 75, 65 Stat. 41.

41 U.S.C.

§ 15. Transfers of contracts; assignments of claims; set-off against assignee

No contract or order, of any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided*, 1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned; 2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment; 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; 4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the dis-

bursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereinafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or

any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section, shall be deemed to affect or impair rights or obligations heretofore accrued. R. S. § 3737; Oct. 9, 1940, c. 779, § 1, 54 Stat. 1029; July 26, 1947, c. 343, Title II, § 205(a), 61 Stat. 501; May 15, 1951, c. 75, 65 Stat. 41.

APPENDIX B

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A 180891

TANENBAUM TEXTILE CO., INC., *Plaintiff*,

v.

WELFARE FINANCE CORPORATION, an Ohio Corporation,

and

NATIONAL FACTORS, INC., an Ohio Corporation, *Defendants*

Memorandum Opinion

GUSWEILER, J.

This matter comes before the Court on a petition which originally included three causes of action. The first and third cause of action having been amicably settled and disposed of by the parties, the only issue present for consideration by this Court, is the second cause of action.

This question involves an arrangement whereby a prime contractor, The Douglas Corporation, who subsequently was dismissed as a party defendant, had entered into contractual relationship with the United States Government for supplying certain materials to the government for the war effort. The prime contractor later assigned these contracts to the Defendant, National Fac-

tors, Inc. The other Defendant, Welfare Finance Corporation became a purchaser of the Douglas account.

Later these original contracts were sub-contracted to the Plaintiff and after partial performance, the government for its own convenience cancelled and terminated the contracts. Subsequently, payments were made by the government to the assignee and the question arises whether the assignee properly credited these sums to outstanding obligations owing to the assignee from the original contractor, or whether those sums should have been paid to the sub-contractor Plaintiff, in the present cause of action.

The Defendant's contention is primarily based on the terms of the "Assignment of Claims Act" wherein the assignee is alleged to have authority to apply funds to his outstanding account with the assignor.

This Court has reviewed all the authorities submitted by Counsel in their memorandums on this question and is of the opinion that under the factual situation as presented in this case the Assignment of Claims Act has no application.

The Defendant, National Factors, Inc., was an assignee and its position can be no different than its assignor, Douglas. Under the terms of the contract and the regulations imposed by the United States Government, Douglas, the original and prime contractor was specifically bound to pay to the sub-contractor, Plaintiff, money which was advanced to Douglas for the adjudication of expenses incurred by the sub-contractor up to the time of termination by the government. (This also includes incidental expenses incurred by the termination of the contract.)

Since the Defendants are assignees of Douglas they stand in the shoes of the original contractor and are

bound by and subject to the original contractual relationship which existed between Douglas and the Plaintiff.

The briefs of Counsel have further pointed out certain relationship between the parties which included a so-called guarantee which was executed by these Defendants. This Court does not feel that the question of guarantee is one which should be properly commented upon since that issue has been disposed of heretofore by entry of the parties.

It is therefore, the judgment of this Court that the Defendants are holding the sums heretofore paid by the United States Government for the use and benefit of the Plaintiff and are at the present time liable to the Plaintiff in the amount sought together with interest from the date when this money should have been paid to Plaintiff.

Judgment is therefore rendered for the Plaintiff.

APPEARANCES:

MR. GEORGE W. WEBER, JR.,
SCHMIDT, EFFRON, JOSSELSON & WEBER,
Attorney for the Plaintiff

MR. HARRY M. WASSERMAN,
Attorney for the Defendants.

October 14, 1963.

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-180891

TANENBAUM TEXTILE CO., INC., *Plaintiff*,

v.

WELFARE FINANCE CORPORATION, an Ohio Corporation,

and

NATIONAL FACTORS, INC., an Ohio Corporation, *Defendants*

Separate Findings of Fact and Law

The separate conclusions of law hereafter set forth outlining the reasons and bases of the Court's opinion, will make it immediately apparent that the numerous Interrogatories filed by Defendant are either unnecessary or irrelevant and not of probative force. However, to avoid any possibility of error, answers to this series of questions are appended hereto.

FINDINGS OF FACTS

A brief summary of the stipulated facts is as follows:

1. The Douglas Corporation entered into contracts with the United States Government, and thereafter assigned to the Defendants, National Factors, all money due or to become due to the Douglas Corporation thereunder. In accordance with the Assignment of Claims Act, written notice of these assignments were filed by Defendant, National Factors, with the Philadelphia Quarter Master Depot. Douglas contracted with Plaintiff to furnish the cloth. (Plaintiff, in turn, contracted with Standard Products, Inc., and Electro Plastics, Inc., to coat the cloth but this is not of any importance in that these companies had no contrac-

tual relations with Douglas so that Plaintiff is the immediate subcontractor of Douglas and the other two companies were subcontractors of Plaintiff). Later, the Government terminated the contracts for the convenience of the Government. Procedures were thereupon followed as provided for and prescribed in the Armed Service Regulations (ASPR).

2. The Defendants claim that Defendant, National Factors, had advanced money to the Douglas Corporation to finance these contracts for which the latter is indebted to it in excess of the amount received by Defendant, National Factors. A finding on this question is unnecessary in view of the fact that the Court's decision is not dependent thereon.

3. The claim of Defendants is that, as assignee, they have superior rights by reason of the "Assignment of Claims Act." The only facts that need be considered, therefore, are those directly related to this issue.

4. The original contracts between the United States and the Douglas Corporation, the subject of the assignment, expressly provides that upon termination by the Government and upon determination of any immediate subcontractor's claim (Plaintiff being such immediate subcontractor), the Douglas Corporation (assignor) "*shall pay*" such immediate subcontractor the amount of its claim; that Douglas' "*obligation to make payment*" to each of its immediate subcontractors (including plaintiff) was subject only to any deduction for claims of Douglas "in connection with the contract." There are no such claims by Douglas so that the exception is inapplicable.

5. Armed Service Procurement Regulation (ASPR) issued under authority of 5 U.S.C., Sec. 22 and 10 U.S.C. Sects. 2202, 2301, 2314, in effect at all times involved in this litigation, including the times when the prime contracts

were executed and when they were assigned to Defendant, prescribe the provisions to be incorporated in the Government contracts as well as in all termination notices, papers and agreements. ASPR provides in substance that, upon termination by the Government, the prime contractor is responsible for the prompt settlement of the termination claims of immediate subcontractors. All settlement proposals and settlement agreements executed in this case were in the form and contained provisions as prescribed by ASPR.

6. In the notice of termination (as prescribed by ASPR) Douglas was requested to settle the subcontractors claims as promptly as possible.

7. In all the various settlement proposals filed with the Government by Douglas on its behalf and on behalf of its subcontractors, Douglas expressly promised to pay or credit each immediate subcontractor (Plaintiff) promptly upon receipt by Douglas of the amount covering any settlement with such immediate subcontractor (as provided in ASPR).

8. Under Modifications 4 and 6 (Exhibits 13A and 14A) the United States and Douglas ageed on a settlement of Plaintiff's claim for $82,524.72. The modifications recited (in accordance with ASPR) that this settlement was "for" Plaintiff. Under ASPR payments by the United States are not made directly to subcontractors but rather to the prime contractor (or, as in this case, to its assignee) subject to the agreement contained in the Modifications that each immediate subcontractor (in this case, Plaintiff) would be paid the amount to which it was entitled (in this case, Plaintiff was entitled to $82,524.72) within ten days after the prime contractor received the money. The only exception pertained to the contractor's privilege to deduct whatever might then be due and payable to him from a subcontractor. In this case, no claim is made of any such

indebtedness of Plaintiff to Douglas so that the exception is inapplicable.

9. On April 13, 1961, Defendants purchased the account of Douglas arising from these contracts in full satisfaction of any claims which Defendants might have had against Douglas.

10. The Defendants have held the $82,524.72 which was received on July 18, 1960 under Modification Nos. 4 and 6, and have refused to pay Plaintiff so that Plaintiff has received no part of said sum.

CONCLUSION OF LAW

1. The Defendant, National Factors, was an assignee of the contract and complied with the Assignment of Claims Act. The other Defendant, Welfare Finance Corporation, became a purchaser of the Douglas account.

2. The Defendant's contention is primarily based on the terms of the "Assignment of Claims Act" wherein the assignee is alleged to have authority to apply funds to his outstanding account with the assignor. The Court finds that the Assignment of Claims Act has no application to the question of the rights as between Plaintiff and Defendant in this action.

3. The Defendant, National Factors, Inc., was an assignee and its position can be no different from its assignor, Douglas. This fundamental rule of law is unaffected in this action by the Assignment of Claims Act. Under the terms of the contract and the Regulations (ASPR) imposed by the United States Government, Douglas, the prime contractor, was specifically bound to pay to the subcontractor, Plaintiff, any money which was advanced by the Government to Douglas for the express purpose of paying the claims of Plaintiff (Douglas' immediate subcontractor).

This also includes incidental expenses by the subcontractor incurred as a result of the termination of the contract.

4. Since the Defendants are assignees of Douglas they stand in the shoes of the original contractor, Douglas, and are bound by and subject to the same conditions and obligations imposed upon Douglas in the contracts and by the Regulations (ASPR).

5. The briefs of Counsel have further pointed out certain relationship between the parties which included a so-called guarantee which was executed by these Defendants. This Court does not feel that the question of guarantee is one which should be properly commented upon since that issue has been disposed of heretofore by entry of the parties.

It is, therefore, the judgment of the Court that the Defendants are holding the sums heretofore paid by the United States Government for the use and benefit of the Plaintiff and are at the present time liable to the Plaintiff in the amount sought together with interest from July 18, 1960, the date when this money should have been paid to Plaintiff.

Judgment, therefore, is rendered for the Plaintiff.

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

Hamilton County, No. 9470

TANENBAUM TEXTILE CO., INC., *Plaintiff-Appellee,*

v.

WELFARE FINANCE CORPORATION,

and

NATIONAL FACTORS, INC., *Defendants-Appellants.*

APPEAL ON QUESTIONS OF LAW FROM COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Opinion

(April 27, 1964)

Messrs. Whyman and Neitlich, 104 E. 40th Street, New York 16, N. Y. and Schmidt, Effron, Josselson & Weber, 809 Atlas Bank Building, Cincinnati 2, Ohio, for Plaintiff-Appellee.

Mr. Harry M. Wasserman, 906 Main Street, Cincinnati 2, Ohio, for Defendants-Appellants.

HOVER, P. J.

This is an appeal on questions of law from a decision of the court below awarding a money judgment to the plaintiff, appellee here, and against the appellants. The matter was heard on the transcript of the docket and

journal entries of the court below, a bill of exceptions, unusually extensive and detailed briefs of both parties, and the arguments of counsel.

Upon consideration whereof, the Court finds itself in complete agreement with the judgment of the court below. While the memorandum opinion filed in that court oversimplifies the numerous questions raised by this case, the extensive and detailed findings of fact and conclusions of law rendered in that court cover every material and pertinent phase of the factual and legal questions involved. This finding makes it abundantly clear that the court below based its judgment both upon the applicability of the Ohio common law rule relative to assignments generally to the effect that the rights of the assignee are controlled by those of the assignor and, further, upon the applicable Federal statute, the so-called Assignment of Claims Act and upon the specific provisions contained in the contract itself for the payment of claims upon termination. The judgment below is right on both counts.

Appellant calls the Court's attention to the case of *Peterman Lumber Company* v. *First National Bank of Fort Smith*, decided by the United States District Court for Arkansas, 128 Fed. Sup. 6. Appellant claims that this case is the same as the instant case as to its controlling factors and that the case holds, as it does, that the bank, as assignee, is entitled to priority over the claim of a subcontractor on what is a contract either identical to that in the instant case or very close to it.

Appellant overlooks that portion of the court's opinion in the case relied upon which draws a decided distinction between the controlling circumstances before it, and the controlling circumstances in the instant case. On page 13, the court states:

> "Thus the vital issue in this case is whether the assignment was to secure all the debts incurred by Adams

to the Bank in the financing of the Government contracts, or was solely to secure the advances made by the Bank to Adams on the particular contract herein involved.

"If the assignment was merely to secure the money advanced by the Bank to Adams in connection with this particular contract, then the Bank's right would not extend to money claimed by plaintiff herein, since all funds advanced by the Bank on this contract were repaid to the Bank and the money claimed by plaintiff was used by the Bank to pay an indebtedness incurred by Adams to it on a previous contract or contracts, the proceeds of which had also been assigned to the Bank.

"But, if the assignment was made to secure the money advanced by the Bank to Adams in connection with his whole operation of performing Government contracts, then the Bank's right would extend to the money claimed by plaintiff, since said money was used to pay an indebtedness owed by Adams to the Bank in connection with such contract or contracts."

In the case at bar, the contract was terminated according to its provisions by the contracting party. There is no doubt that in the words of the above quoted provision, "the assignment was merely to secure the money advanced by the Bank to (the contractor) in connection with this particular contract, . . . the Bank's right would not extend to money claimed by the plaintiff herein."

Such was the factual situation in the case at bar, and the case principally relied upon by appellant thus not only does not support his position but recognizes that the conclusion reached by the court under the facts of this case is correct.

The judgment is accordingly affirmed.

HILDEBRANT and LONG, J. J., concur.

APPENDIX E

Journal Entries

TANENBAUM TEXTILE CO. v. WELFARE FINANCE CORP. ET AL., Case No. 38902

JOURNAL 46, PAGE 576
MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

JOURNAL 46, PAGE 576
MOTION BY APPELLEE TO DISMISS APPEAL AS OF RIGHT.

It is ordered by the Court that this motion is sustained.

JOURNAL 46, PAGE 579
APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY.

This cause, here on appeal as of right from the Court of Appeals for Hamilton County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellants its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

APPENDIX F

IN THE SUPREME COURT OF OHIO

No. 38902

TANENBAUM TEXTILE CO., INC., *Plaintiff-Appellee,*

v.

WELFARE FINANCE CORPORATION, an Ohio Corporation,

and

NATIONAL FACTORS, INC., an Ohio Corporation,
Defendants-Appellants.

Entry of a Certification

On motion of Defendants-Appellants, Welfare Finance Corporation and National Factors, Inc., this Court, in addition to the Orders made herein, orders it to be certified and made a part of the Record in this case that in the appeal from the Court of Appeals, First Appellate District, Hamilton County, Ohio, in the Assignment of Errors and Brief filed in this Court, and in the argument by counsel for Defendants-Appellants in this Court, it was relied upon by said Defendants-Appellants that the rights of the parties were governed by the Federal Assignment of Claims Act of 1940, as amended, (31 USCA 203; 41 USCA 15); that the applicability of said Assignment of Claims Act had been presented to the Trial Court and Court of Appeals, both of which Courts ruled adversely to Defendants-Appellants; that a Federal question exists as to whether or not the rights of the parties herein are governed by the Assignment of Claims Act, and the applicability thereof, and that this Court dismissed said appeal for the reason that no substantial constitutional question was involved, and that this Court overruled Defendants-Appellants Motion for an Order Directing the Court of Appeals for Hamilton County, Ohio, to certify its Record.

It is hereby further certified that this Court is the highest Court of law and equity in the State of Ohio in which a decision of this case could be had.

/s/ KINGSLEY TAFT
Chief Justice

1965 TERM

To wit: Monday, March 1, 1965

No. 38902

THE STATE OF OHIO,
City of Columbus.

TANENBAUM TEXTILE CO., INC., *Plaintiff-Appellee,*

v.

WELFARE FINANCE CORPORATION, *et al.,*
Defendants-Appellants.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 47 *Page* .... *IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this* 1st *day of* March 1965.

THOMAS L. STARTZMAN *Clerk.*
By NORMAN MYERS *Deputy.*
/s/ Norman Myers